RADTHA D/O RAJU & 358 ORS.

v.

DUNLOP ESTATES BHD.

COURT OF APPEAL, KUALA LUMPUR
DATUK HJ. SHAIK DAUD BIN HJ. MOHD. ISMAIL JCA
DATO' N.H CHAN JCA
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD JCA
[CIVIL APPEAL NO. J-04-53-94]
10 JANUARY 1996

LABOUR LAW: *Contract of service - Estate workers - Change of ownership of business - Estate sold to new owners - Whether there was termination of contract of service - Whether employer duty bound to give notice of termination - Failure to give notice - Effect - Whether employees entitled to indemnity in lieu of notice - Section 12(3)(f) Employment Act 1955 - Regulation 8(1), (2) & (3) Employment (Termination and Lay-Off Benefits) Regulations 1980.*

INTERPRETATION: *Section 12(3)(f) Employment Act 1955 - Object - Whether to protect employees - Whether to provide security of employment - Whether to be operative once a fact of termination had occurred.*

The appellants were employed by the respondent as its estate workers up to 31 August 1990. On 1 September 1990 the respondent sold the estate to Industrial Oxygen Industries Bhd. and Dynamic Plantations Bhd. (the new owners). Following that, on 4 September 1994, the new owners made offers of employment to the appellants, on terms and conditions not less favourable to the appellants' contract of employment with the respondent. On 7 Sepember 1990, the appellants accepted the offer and thereafter their services with the new owners continued uninterrupted.

In disposing of the estate to the new owners, the respondent did not issue any letter terminating the contract of service of the appellants, or any notice of termination of service to them. The appellants claimed that under s. 12(3)(f) of the Employment Act 1955 (the Act), it was wrongful of the respondent not to have given them such notice, and in the upshot, filed a claim before the Labour Court, pursuant to s. 13(1) ofhe Act, for indemnity in lieu of notice amounting to RM231,490.16. The Labour Court dismissed the claim, holding that reg. 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 (the Regulations) applied by reason of the appellants' continued employment with the new owners, and so no termination of contract of service had taken place. It was further held that the appellants had suffered no monetary loss, and therefore, were not entitled to any indemnity. On appeal,

the High Court affirmed the decision of the Labour Court ruling in essence that, since there was no termination taking place the question of indemnity did not arise. Hence this appeal by the appellant.

Before the Court of Appeal Judges, the appellants argued that their contract of service had been terminated on 31 August 1990, and that being the case, s. 12(3)(f) of the Act applied with the result that they were entitled to, and the respondent was bound to give, notice of termination of service. According to the appellants further, the respondent could not escape its statutory duty under the Act by not simply teminating, as an employer changing ownership is required by law to give notice of termination or pay indemnity in lieu thereof under s. 13(1) of the Act. The respondent reiterated the points taken by the Courts below, submitting that there was no termination of contract of service by virtue of reg. 8 of the Regulations, and so there was no necessity for any notice of termination of service. The issue that arose was whether the change of ownership of the respondent's business here amounted to a termination within the meaning of s. 12(3)(f) of the Act.

Held:

Per Shaik Daud Ismail JCA (majority decision).

[1] The object of s. 12(3)(f) of the Act is to protect the employee in case of change of ownership of a particular business or part of that business. It is to provide security in his employment. Clearly, if no notice is required to be given, his position as employee will be neither here nor there. Hence, there ought to be a termination under one employer and if necessary the beginning of one under the new employer. Such a notice is also necessary in order to give the employee an alternative as he may not wish to be employed by the new owner.

[2] Once there is an act of termination established, *ipso facto* s. 12(3)(f) of the Act becomes operative. In the present case, in the light of the clear admission by the parties that the appellants ceased to be employed by the respondent after 31 August 1990, a fact of temination had in fact occurred with the result that the provision of s. 12(3)(f) came into operation. The respondent is therefore duty bound by law to issue notice of termination with effect from 1 September 1990. It has no alternative but to comply with the clear provisions of the section, and the fact that new offers of continued employment is given by the new employer makes no difference.

[3] The question of continuous employment only becomes relevant where the employee is seeking termination benefits under the Regulations. In this case the claim is not one for termination benefits under the Regulations but one under the provisions of the Act for an indemnity in lieu of notice. In the circumstances, only the provisions of the Act ought to be considered and the issue of s. 8 of the Regulations has no relevance.

[4] Both the Labour Court and the High Court went astray when they were harbouring the issue of continuation of service and that there was no monetary loss. These two issues are irrelevant for the purpose of interpreting s. 12(3)(f) of the Act. Both Courts, while accepting the agreed facts appear to give no effect to them.

Per N.H.Chan JCA (dissenting judgment):

[1] Section 12(3) of the Act provides that where the dismissal of the employee is attributable to any of the circumstances mentioned therein, then the employee is entitled to, and the employer must give to the employee, notice of termination of the employee's contract of employment. Under subsection (4) such notice is to be in writing.

[2] In the instant case s. 12(3) does not apply because there was no written notice of termination of service of the employee from the employer attributing the dismissal to the change in ownership of the estate under subsection (3)(f). There was also no termination of the employee's employment by the employer without notice under s. 13(1) as there was no payment made or tendered by the employer to the employee in lieu of notice in accordance with the section.

[3] At common law if an employer transfers his business to another, the employee's contract of employment with the employer comes to an end. There is however statutory provision contrary to the position at common law and this is found in reg. 8(3) of the Regulations. In the present case the facts support the application of reg. 8(3).

Per Abdul Malek Ahmad JCA (majority decision):

[1] On the facts, the Court is not concerned with the aspect of termination benefits in the circumstances enumerated in reg. 8 of the Regulations. What the Court is concerned with is whether the facts of a change of ownership of the business amounts to a termination.

[2] Section 12(3) is abundantly clear in statutorily declaring that the change of ownership of the business amounts to a termination and that a notice of termination is nothing less than statutory. Further, since no notice of termination had been given for this occurance, indemnity in lieu of notice is due to the appellants. It does not matter that seven days after the event the appellants had accepted the offer made by the new owners.

[Appeal allowed. Respondent directed to pay the amount claimed].

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG BURUH:** Kontrak perkhidmatan - Pekerja-pekerja estet - Penukaran pemilikan perniagaan - Estet dijual kepada pemunya baru - Samada terdapat penamatan kontrak perkhidmatan - Samada majikan terikat oleh kewajipan untuk memberikan notis penamatan - Kegagalan untuk memberi notis - Kesan - Samada pekerja berhak kepada tanggungan rugi bagi menggantikan notis - Seksyen 12(3)(f) Akta Pekerjaan 1955 - Peraturan-peraturan 8(1), (2) dan (3) Peraturan-peraturan Pekerjaan (Penamatan dan Pemberhentian) 1980.*

***TAFSIRAN:** Seksyen 12(3)(f) Akta Pekerjaan 1955 - Tujuan - Samada untuk melindungi pekerja-pekerja - Samada untuk memberikan jaminan pekerjaan - Samada hendaklah beroperasi sebaik sahaja hakikat mengenai penamatan berlaku.*

Perayu-perayu telah diambil bekerja oleh responden sebagai pekerja-pekerja estet sehingga 31 Ogos 1990. Pada 1 September 1990 responden telah menjual estet tersebut kepada Industrial Okygen Industries Berhad dan Dynamic Plantations Berhad (pemunya baru). Berikutnya, pada 4 September 1994 pemunya baru tersebut telah membuat tawaran pekerjaan kepada perayu-perayu berdasarkan terma-terma dan syarat-syarat yang tidak kurang baiknya dengan kontrak pekerjaan perayu dengan responden. Pada 7 September 1990 perayu-perayu telah menerima tawaran itu dan selepas itu perkhidmatan mereka dengan pemunya-pemunya baru tersebut berterusan tanpa gangguan.

Dalam melupuskan estet tersebut kepada pemunya baru, responden telah tidak mengeluarkan apa-apa surat bagi menamatkan kontrak perkhidmatan dengan perayu, ataupun apa-apa notis penamatan perkhidmatan kepada mereka. Perayu-perayu menuntut bahawa di bawah s. 12(3)(f) Akta Pekerjaan 1955 (Akta tersebut), ianya adalah salah bagi responden kerana tidak memberikan notis yang sedemikian kepada mereka, dan berikutan itu, telah memfailkan satu tuntutan di hadapan Mahkamah Buruh selaras dengan s. 13(1) Akta tersebut, untuk tanggungan rugi sebagai ganti bagi notis yang berjumlah sebanyak RM231,490.16. Mahkamah Buruh telah menolak tuntutan tersebut, dengan memutuskan bahawa peraturan 8 Peraturan-peraturan Pekerjaan (Faedah-faedah Pemberhentian dan Penamatan) 1980 (peraturan-peraturan tersebut) telah terpakai oleh kerana pekerjaan perayu-perayu yang berterusan dengan pemunya baru dan dengan yang demikian tidak berlaku penamatan kontrak perkhidmatan. Seterusnya diputuskan bahawa perayu-perayu tidak mengalami kerugian wang, dan dengan itu, adalah tidak berhak kepada apa-apa tanggungan rugi. Di atas rayuan, Mahkamah Tinggi telah mengikrarkan keputusan Mahkamah Buruh tersebut dan memutuskan secara pentingnya bahawa oleh kerana tidak terdapatnya penamatan kontrak perkhidmatan, persoalan tanggungan rugi tidak berbangkit. Ini membangkitkan rayuan oleh perayu-perayu.

Dihadapan Hakim-hakim Mahkamah Rayuan, perayu telah berhujah bahawa kontrak perkhidmatan mereka telah ditamatkan pada 31 Ogos 1990, dan dalam keadaan itu, s. 12(3)(f) Akta tersebut terpakai dengan akibat bahawa mereka berhak kepada, dan responden pula terikat untuk memberi notis penamatan perkhidmatan. Menurut perayu selanjutnya, responden tidak terlepas daripada kewajipan statutori mereka dibawah Akta dengan tidak membuat penamatan tersebut, kerana majikan yang menukar pemilikan adalah dikehendaki oleh undang-undang untuk memberikan notis penamatan atau membayar gantirugi sebagai gantinya dibawah s. 13(1) Akta. Responden telah mengulangi hujah-hujah yang diterimapakai oleh Mahkamah-Mahkamah di bawah, sambil menyatakan bahawa tidak terdapat penamatan kontrak perkhidmatan menurut peraturan 8 Peraturan-peraturan tersebut, dan dengan itu adalah tidak perlu mengeluarkan notis penamatan perkhidmatan. Isu yang berbangkit adalah samada penukaran pemilikan perniagaan responden membawa kepada suatu penamatan perkhidmatan dalam lingkungan maksud s. 12(3)(f) Akta.

Diputuskan:

Per Shaik Daud Mohd. Ismail HMR (keputusan majoriti):

[1] Matlamat s. 12(3)(f) Akta tersebut adalah untuk melindungi pekerja sekiranya berlaku penukaran pemilikan sesebuah perniagaan atau sebahagian daripada perniagaan itu. Ianya bertujuan untuk memberikan jaminan dalam pekerjaannya. Jelasnya, jika notis tidak perlu diberikan, kedudukannya sebagai pekerja akan tidak menjadi menentu. Dengan itu haruslah terdapat satu penamatan di bawah satu majikan dan jika perlu permulaan satu pekerjaan di bawah majikan baru. Notis yang sedemikian adalah juga perlu bagi memberikan pekerja itu suatu alternatif kerana beliau mungkin tidak ingin untuk bekerja dengan pemunya baru tersebut.

[2] Sebaik sahaja suatu perbuatan penamatan telah ditentukan, *ipso facto*, s. 12(3)(f) Akta tersebut mula beroperasi. Dalam kes semasa memandangkan pengakuan jelas oleh pihak-pihak disini bahawa perayu telah diberhentikan oleh responden selepas 31 Ogos 1990, fakta mengenai penamatan telah pada hakikatnya berlaku, yang telah mengakibatkan peruntukan s. 12(3)(f) mula beroperasi. Responden adalah dengan itu terikat oleh kewajipan untuk mengeluarkan notis penamatan yang berkuatkuasa pada 1 September 1990. Ianya tidak mempunyai alternatif lain melainkan mematuhi peruntukan-peruntukan nyata dari seksyen tersebut, dan hakikat bahawa tawaran-tawaran baru bagi meneruskan pekerjaan telah diberikan oleh majikan baru tersebut tidak menjadikan kedudukan ini berbeza.

[3] Persoalan pekerjaan yang berterusan hanya menjadi relevan di mana pekerja berusaha untuk mendapatkan faedah-faedah penamatan di bawah Peraturan-peraturan tersebut. Dalam kes ini tuntutan tersebut bukannya merupakan tuntutan bagi mendapatkan faedah-faedah penamatan di bawah peraturan tersebut tetapi merupakan tuntutan di bawah peruntukan-

peruntukan Akta untuk satu tanggungan rugi bagi menggantikan notis. Dalam keadaan tersebut hanya peruntukan-peruntukan Akta harus dipertimbangkan dan isu s. 8 peraturan-peraturan adalah tak relevan.

[4] Kedua-duanya Mahkamah Buruh dan Mahkamah Tinggi telah terkeluar dari haluannya bilaman mereka melindungi isu penerusan perkhidmatan dan bahawa tidak terdapat kerugian wang. Kedua-dua isu ini adalah tak relevan bagi tujuan mentafsirkan s. 12(3)(f) Akta. Kedua-dua Mahkamah, sambil menerima fakta-fakta yang telah dipersetujui kelihatan sebagai tidak menguatkuasakannya.

Per N.H. Chan HMR (penghakiman bertentangan):

[1] Seksyen 12(3) Akta, memperuntukkan bahawa di mana pemecatan pekerja adalah disebabkan oleh mana-mana dari keadaan yang tersebut di dalamnya, maka pekerja adalah berhak kepada, dan majikan tersebut haruslah memberi kepada pekerja tersebut, notis penamat kontrak pekerjaan pekerja tersebut. Di bawah seksyen kecil (4) notis yang sedemikian hendaklah bertulis.

[2] Dalam kes semasa s. 12(3) tidak terpakai kerana tidak terdapatnya notis penamatan perkhidmatan bertulis pekerja daripada majikan yang mengaitkan pemecatan tersebut dengan penukaran pemilikan estet di bawah seksyen kecil (3)(f). Tidak juga terdapat penamatan terhadap pekerjaan pekerja tersebut oleh majikan tanpa notis di bawah s. 13(1) kerana tidak terdapat pembayaran yang telah dibuat sebagai ganti notis menurut seksyen tersebut.

[3] Menurut common law jika majikan memindahkan perniagaannya kepada yang lain, kontrak pekerjaan-pekerjaan tersebut dengan majikan itu tamat. Namun begitu terdapat peruntukan statutori yang bertentangan kepada kedudukan tersebut pada common law dan ini terdapat dalam peraturan 8(3) Peraturan-peraturan tersebut. Dalam kes semasa fakta-fakta menyokong pemakaian peraturan 8(3).

Per Abdul Malek Ahmad HMR (keputusan majoriti):

[1] Berdasarkan fakta, Mahkamah tidak mengambil berat mengenai aspek faedah-faedah penamatan dalam keadaan yang diturunkan satu persatu dalam peraturan 8 Peraturan-peraturan tersebut. Apa yang diambil perhatian oleh Mahkamah adalah samada fakta-fakta mengenai penukaran pemilikan perniagaan tersebut membawa kepada suatu penamatan.

[2] Seksyen 12(3) dengan jelasnya mengisytiharkan secara statutori bahawa penukaran pemilikan perniagaan membawa kepada suatu penamatan dan bahawa notis penamatan adalah statutori. Selanjutnya, oleh kerana tiada notis penamatan yang telah diberikan bagi perkara ini, tanggungan rugi

sebagai ganti bagi notis adalah kena diberikan kepada perayu. Ianya tidak menjadi hal bahawa dalam tempoh tujuh hari selepas peristiwa itu, perayu telah menerima tawaran yang dibuat oleh pemunya baru tersebut.

[Rayuan dibenarkan. Responden diarah supaya membayar jumlah yang dituntut].

Cases referred to:
Premier Motors v. Total Oil [1984] 1 WLR 377 ***(refd)***
Nokes v. Doncaster Amalgated Collieries Ltd. [1940] AC 1014 ***(refd)***

Legislation referred to:
Employment Act 1955, ss. 1(2), 12(1), (2), (3)(f), (4), 13, (1), 69, 102
Employment (Termination and Lay-Off Benefits) Regulation 1980, regs. 4(4), 8(1), (2), (3).
Evidence Act 1950, s. 101

Other source referred to:
Halsbury's Laws of England, 4th Edn., Vol. 16, reissue 1992, p. 288, para. 297

For the appellant - B. Lobo; M/s. Lobo & Assoc.
For the respondent - N. Sivabalah; M/s. Shearn Delamore & Co.

JUDGMENT

Shaik Daud Mohd. Ismail JCA:

This is an appeal from the decision of the High Court Kuala Lumpur whereby on 21 September 1994 the Court dismissed the appeal of the appellants against the decision of the Labour Court. The facts of the case are not in dispute.

All the appellants who were members of the Estate Workers Union were originally employed by Dunlop Estates Bhd. (hereinafter I shall refer to as "Dunlop") at their rubber estate known as Segamat, Gombali and Paya Lang (hereinafter I shall refer to as "the estate") up to 31 August 1990. On 1 September 1990 the estate was sold to Industrial Oxygen Industries Bhd. and Dynamic Plantations Bhd. (hereinafter I shall refer to as "IOI-Dynamic").

The appellants contend that on 4 September 1990 I0I-Dynamic the new owner of the estate made offers of employment to all appellants in the same estate on terms should they accept the offers, their services would be continued. All the appellants accepted the offers on 7 September 1990 & thereafter their services continued uninterrupted with I0I-Dynamic.

Appellants contend that Dunlop failed to give them notices of termination of their employment with Dunlop as required by s. 12(3)(f) Employment Act 1955 (hereinafter I shall refer to as "the Act"). Their claim against Dunlop is for a total sum of RM231,490.16 as indemnity in lieu of notices as a result of the sale of the estate to I0I-Dynamic, as provided by s. 13 of the Act. Hence they filed their claim under s. 69 of the Act before the Labour Court. Their

claim was heard by the Penolong Pengarah Buruh who dismissed their claim on the following grounds:

1. There was no termination of service;
2. The complainants had received offers of continued employment by the new employer;
3. The complainants were paid same wages in their respective capacity, on the same terms and conditions which were not different from their previous employment; and
4. The complainants suffered no monetary loss. The Court held that Dunlop therefore need not pay any indemnity in lieu of notices and accordingly rejected their claims.

On appeal to the High Court their appeal was dismissed and the decision of the Labour Court was confirmed. The High Court held that as the contract of service is not for a specific period it continues until it is terminated. The Court agreed that as there was no termination the question of indemnity in lieu of notice does not arise. Hence this appeal.

Learned Counsel for the appellants Mr. Lobo submitted that the High Court was wrong in law when it held that there was no termination of employment. He refers to the agreed facts as recorded by the High Court. He submits that the first two items of the agreed facts clearly established the fact of termination. It was agreed by the parties both in the Labour Court and in the High Court:

(a) that all the appellants were employed by Dunlop up to 31 August 1990 and

(b) on 1 September 1990 there was a change of ownership of the estate.

He contends that by these two agreed facts alone, there is in evidence the fact of termination. He contends that even though there was no interruption of employment, as a result of the change of ownership, there must be a fact of termination of employment with the old employer and a beginning of employment with the new employer and once this fact exists, then the provisions of s. 12(3)(f) of the Act become operative. Therefore the appellants shall be entitled to, and the employer shall give to the employee, notice of termination of service. He contends that the old employer cannot escape his statutory duty under the Act by not simply terminating, as an employer changing ownership is required by law to give notice of termination or pay indemnity in lieu thereof under s. 13(1) of the Act.

Learned Counsel for the respondent however submits that there is no principle of law that when a change of ownership occurs there is automatic termination of employment. He contends that the employment of all the appellants continue

independently up to 6 September 1990, and they are all employed by Dunlop. By virtue of reg. 8(1) and 8(3) of the Employment (Termination and Lay-Off Benefits Regulation 1980, (a Regulation made under s. 102 of the Act) the moment the employee accepts the offer of continued employment his period of employment would go back to the date of the change of ownership with the new employer i.e. in this case it would be from 1 September 1990. Hence it is contended that there is no termination.

Now s. 12(3)(f) of the Act provides that:

> (3) Notwithstanding anything contained in subsection(2), where the termination of service of the employee is attributable wholly or mainly to the fact that -
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> [(a) to (e) has no application];
>
> (f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law,
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> the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under subsection (2)(a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the period of notice.

The calculation for the amount of the indemnity is provided for by s. 13(1) of the Act.

It is my view that the object of this subsection is to protect the employee in case of change of ownership of a particular business or part of that business. It is to provide security in his employment. If no notice is required to be given then I feel that his position as employee will be neither here nor there. There ought to be a termination under one employer and if necessary the beginning of one under the new employer. Otherwise as in the present case if anything were to happen to an employee say on 3 September 1990 it is debatable under whose employment would he be considered. Secondly I would think that such a notice would be necessary in order to give the employee an alternative as he may not wish to be employed by the new employer. Therefore it is my view that the subsection is to safeguard the employee's position.

The crucial issue to be determined in the circumstances of the present case is whether there is a termination of service of the appellants when Dunlop sold the estate to I0I-Dynamic. In the light of the clear admission that the appellants ceased to be employed by Dunlop after 31 August 1990, I for my part would agree with the submission by learned Counsel for the appellants that a fact of termination had occurred and once this happens, the provisions of s. 12(3)(f) must be operative and Dunlop is duty bound by law to issue notice of termination with effect from 1 September 1990. It is my view that

both the Labour Court and the High Court went estray when they were harbouring the issue of continuation of service and that there was no monetary loss. These two issues, to my mind, are irrelevant for the purpose of interpreting s. 12(3)(f) of the Act. Both Courts while accepting the agreed facts appear to give no effect to them. It would be of no use for parties to agree on certain facts when Courts give no effect to them. The issue of s. 8 of the Regulations too has no relevance as the claim is not one for termination benefits under the Regulations but one under the provisions of the Act for an indemnity in lieu of notice. Only the provisions of the Act ought to be considered and this provision is to my mind clear. Once there is a fact or evidence of change of ownership, and more so in this case in view of the clear admission by Dunlop, a fact of termination exists and Dunlop has no alternative but to comply with the clear provisions of s. 12(3)(f) of the Act, by giving notice of termination to the appellants. The fact that new offers of employment are given by the new employer makes no difference. When they agreed that the services of the appellants were up to 31 August 1990, Dunlop has thereby admitted that the relationship between the appellants and Dunlop had been severed on 31 August 1990. As such a fact of termination has occurred. It would be superfluous to have provisions such as in s. 12(3)(f) of the Act where the former employer can circumvent it by merely saying that as the employee had been taken over by the new employer, there is no termination.

After giving careful consideration on the matter I am of the view that it is encumbent upon the old employer to give notice of termination to the employee when there occurs a change of ownership of the business or part of the business of the employer, and as far as s. 12(3)(f) of the Act is concerned it is irrelevant whether the employee is offered continuous employment with the new employer. The question of continuous employment only becomes relevant where the employee is seeking termination benefits under the Regulations.

For the above reasons, I for my part agree with the submissions of learned Counsel for the appellants that once there is an act of termination established, as in this case, *ipso facto* s. 12(3)(f) of the Act becomes operative. Therefore I would allow this appeal with costs here and the Court below, and consequently direct that Dunlop do pay the appellants the amount claimed i.e. RM231,490.16 as indemnity in lieu of notice.

N.H. Chan JCA

At common law a contract of employment may be terminated at any time either by the employer or by the employee. If it is by the employer, it is determined by dismissal and if it is by the employee, the employment is determined by resignation. Dismissal at common law may be either lawful or wrongful.

Section 12(1) of the Employment Act 1955 provides for the termination of a contract of employment at any time either by the employer or by the employee

giving notice in writing (see s. 12(4)) to determine the employment. The subsections read:

> 12. (1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service.
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> (4) Such notice shall be written and may be given at any time, and the day on which the notice is given shall be included in the period of the notice.

The length of notice to be given is the same for both employer and employee and will depend on the written terms for such notice in the contract of employment. In the absence of such provision in writing, then the length of the notice of termination must not be less than the statutory minimum provided in subsection (2) of s. 12 of the Act. It reads:

> 12. (2) The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in writing, shall not be less than -
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> (a) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;
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> (b) six weeks' notice if he has been so employed for two years or more but less than five years on such date.
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> (c) eight weeks' notice if he has been so employed for five years or more on such date:
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> Provided that this section shall not be taken to prevent either party from waiving his right to a notice under this subsection.

See also 16 *Halsbury's Laws of England* (4th edition, reissue 1992) para. 288 at p. 297 which states the position at common law. It says:

> 288. Notice at common law. In the absence of an express stipulation or customary arrangement as to notice, a contract of employment is terminable at common law by reasonable notice. The question as to what is a reasonable period of notice is one of fact, depending on all the circumstances of the case and the nature of the employment, and an implied term of reasonable notice may be greater than the statutory minimum applicable to all employees.

But, in this country, unless there is an express provision in writing as to the length of the notice, the statutory minimum as statutory minimum as specified in s. 12(2) will apply. However, in the absence of any express stipulation as to the length of the notice, a contract of employment is determinable at common law by a reasonable period of notice which may be greater (but must be not less) than the statutory minimum applicable under s. 12(2).

Under s. 13(1) a contract of employment may also be terminated without notice by either the employer or the employee paying an indemnity in lieu of notice (of a sum equal to the amount of wages which would have accrued for the term of the notice) to the other party. The subsection reads as follows:

> 13. (1) Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with s. 12, without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice.

An employer may also terminate the employment of an employee by giving notice which is to be in writing (see s. 12(4)) for any of the reasons stated in s. 12(3), in which case, the length of such notice must not be less than the statutory minimum specified in subsection (2). Section 12(3) is as follows:

> 12. (3) Notwithstanding anything contained in subsection (2), where the termination of service of the employee is attributable wholly or mainly to the fact that -
>
> (a) the employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was employed;
>
> (b) the employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work;
>
> (c) the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;
>
> (d) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish;
>
> (e) the employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer; or
>
> (f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law,
>
> the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under subsection (2)(a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the contract of service.

So that where the dismissal of the employee is attributable to any of the circumstances mentioned in subsection (3), then the employee is entitled to, and the employer must give to the employee, notice of termination of the employee's contract of employment. Such notice is to be in writing (subsection (4)).

In the instant case, s. 12(3) does not apply because there was no written notice of termination of service of the employee from the employer attributing the dismissal (in the instant case) to the change in ownership of the estate under subsection (3)(f). In the instant case, there was also no termination of the employee's employment by the employer without notice under s. 13(1) as there was no payment made or tendered by the employer to the employee in lieu of notice in accordance with the section.

If an employer did not avail itself of the provision of s. 12(3), then, what is the effect on the contractual relationship between master and servant when there was a change in the ownership of the undertaking in which the servant was employed? At common law, "if an employer, A, transferred his business to another, B, the employee's contract of employment with A undoubtedly came to an end.": see by Browne-Wilkinson J in *Premier Motors v. Total Oil* [1984] 1 WLR 377, 360. This is because at common law (see *Nokes v. Doncaster Amalgated Collieries Ltd.* [1940] AC 1014 at 1018, 1019 by Viscount Simon LC):

> ... a, contractual right to personal service was a personal right of the employer and was incapable of being transferred by him to anyone else, and that a duty to serve a specific master could not be part of the property or rights of that master capable of becoming, by transfer, a duty to serve someone else. It is, of course, indisputable that (apart from statutory provision to the contrary) the benefit of a contract entered into by A to render personal service to X cannot be transferred by X to Y without A's consent ... The rule is so strict that if the contract is between individuals on both sides and X dies, the contract of service is immediately dissolved *(Farrow v. Wilson* [1869] LR 4 CP 744, 746) for A never promised to serve X's personal representative and X could only act as employer when alive. Where a firm consisting of four partners engaged the plaintiff as manager for a term of two years, the retirement of two partners from the firm within that period operated as a wrongful dismissal of the plaintiff: *Brace v. Calder* [1895] 2 QB 253. If A's contract is to serve a limited company, X & Co., and X & Co. goes into liquidation, the winding-up order operates as a notice of discharge to the servants of the company: *Chapman's case* [1866] LR 1 Eq. 346.

There is, however, statutory provision contrary to the position at common law and this is found in reg. 8(3) of the Employment (Termination and Lay-Off Benefits) Regulations 1980. Regulation 8 reads as follows:

a 8. Change of ownership of business

(1) Where a change occurs (whether by virtue of a sale or other deposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed or of part of such business, the employee shall not be entitled to any termination benefits payable under these b Regulations, if within seven days of the change of ownership, the person by whom the business is to be taken over immediately after the change occurs, offers to continue to employ the employee under terms and conditions of employment not less favourable than those under which the employee was employed before the change occurs and the employee unreasonably refuses the offer.

c (2) If the person by whom the business is to be taken over immediately after the change occurs does not offer to continue to employ the employee in accordance with paragraph (1), the contract of service of the employee shall be deemed to have been terminated, and consequently, the person by whom the employee was employed immediately before the change in d ownership occurs and the person by whom the business is taken over immediately after the change occurs shall be jointly and severally liable for the payment of all termination benefits payable under these Regulations.

(3) Where an offer by the person by whom the business is taken over immediately after the change occurs to continue to employ the employee e is accepted by such employee the period of employment of the employee under the person by whom the employee was employed immediately before the change occurs, shall, for the purposes of these Regulations, be deemed to be a period of employment under the person by whom the business is taken over, and the change of employer shall not constitute a break in the f continuity of the period of his employment.

By reg. 8(3) a transfer does not operate so as to terminate the contract of employment of an employee by the transferor (employer) in the undertaking transferred but instead provides for the continuation of the contract of employment, on the conditions in reg. 8(3) being satisfied, with the transferee. g At common law such contract of employment would have been terminated by the transfer but now that contract has effect after the transfer as if it was originally made between the person so employed and the transferee without the change of employer constituting a break in the continuity of his employment.

h Unless reg. 8(1) or 8(3) of the Employment (Termination and Lay-Off Benefits) Regulations 1980 applies, the employee is entitled to termination benefits payable under the Regulations (see reg. 8(2)) as "the contract of service of the employee shall be deemed to have been terminated". However, under reg. 4(4),:

i 4(4) An employee shall not be entitled to any termination benefits payment where he leaves the service of his employer before the expiration of any notice given to him by his employer in accordance with s. 12 of the Act -

(a) without the prior consent of the employer, which consent shall not be unreasonably withheld; or

(b) without having made payment to the employer in accordance with s. 13.

In the instant case, the facts support the application of reg. 8(3). I would dismiss the appeal.

Abdul Malek Ahmad JCA:

The agreed facts in this case are as follows:

(a) up to 31 August 1990, the appellants had been employed by the respondent;

(b) on 1 September 1990, there was a change of ownership of the estate;

(c) on 4 September 1990, the appellants had been given letters of offer of continued employment by I0I/Dynamic Plantations Berhad (hereinafter "the new owners");

(d) all the appellants had accepted the offer on 7 September 1990; and

(e) the respondent did not issue any letter terminating the contract of service of the appellants or any notice of termination of service to them.

The whole appeal, to my mind, rests upon the interpretation of s. 12 of the Employment Act 1955 (hereinafter "the Act") in particular subsections 3(f) and (4) and, in consequence, s. 13 as well. For ease of reference, the relevant sections read:

(3) Notwithstanding anything contained in subsection (2), where the termination of service of the employee is attributable wholly or mainly to the fact that -

(a) xxx;

(b) xxx;

(c) xxx;

(d) xxx;

(e) xxx; or

(f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law,

the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under subsection (2) (a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the contract of service.

(4) Such notice shall be written and may be given at any time, and the day on which the notice is given shall be included in the period of the notice.

(1) Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with s. 12, without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice.

(2) Either party to a contract of service may terminate such contract of service without notice in the event of any willful breach by the other party of a condition of the contract of service.

The respondent did not give any notice of termination to the appellants when the new owners took over and the Assistant Director of Labour in Segamat on 19 September 1991 had dismissed the appellants' claim for indemnity amounting to RM231,490.16 in lieu of notice under s. 69 of the Act. The Assistant Director of Labour was of the opinion that reg. 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 (hereinafter "the Regulations") applied and there was no termination of the contract of service of the appellants by the respondent because the appellants had accepted the offer for continued employment with the new owners and that there was never any break in the continuity of the period of employment.

It is relevant to reproduce at this juncture reg. 8 of the Regulations :

8. (1) Where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed or of part of such business, the employee shall not be entitled to any termination benefits payable under these Regulations, if within seven days of the change of ownership, the person by whom the business is to be taken over immediately after the change occurs, offers to continue to employ the employee under terms and conditions of employment not less favourable than those under which the employee was employed before the change occurs and the employee unreasonably refuses the offer.

(2) If the person by whom the business is to be taken over immediately after the change occurs does not offer to continue to employ the employee in accordance with paragraph (1), the contract of service of the employee shall be deemed to have been terminated, and consequently, the person by whom the employee was employed immediately before the change in ownership occurs and the person by whom the business is taken over

immediately after the change occurs shall be jointly and severally liable for the payment of all termination benefits payable under these Regulations.

(3) Where an offer by the person by whom the business is taken over immediately after the change occurs to continue to employ the employee is accepted by such employee the period of employment of the employee under the person by whom the employee was employed immediately before the change occurs, shall, for the purposes of these Regulations, be deemed to be a period of employment under the person by whom the business is taken over, and the change of employer shall not constitute a break in the continuity of the period of his employment.

Learned Counsel for the appellants had argued in the Court below that the contract of service of the appellants with the respondent had been terminated on 31 August 1990 and it was only four days later, namely 4 September 1990, that the new owners had sent the letters of offer. As such, they were entitled to the indemnity in lieu of notice. He had added that the termination benefits under the Regulations were not applicable.

Learned Counsel for the respondent had at that stage submitted that the argument that there had been termination and that consequently the indemnity in lieu of notice was payable was misconceived. This was because, he had went on to say, that it was never the intention of the respondent to terminate the services of the appellants and their employment continued until they voluntarily accepted the offer made by the new owners. The offer was on terms and conditions which were not less favourable that those of their previous contract and they had accepted the offer without any interruption of their employment. They had not, therefore, suffered any financial loss.

He had further stated that in the service contract between the appellants and the respondent, there was no specified period and accordingly s. 11(2) of the Act applied. The said subsection reads:

11. (2) A contract of service for an unspecified period of time shall continue in force until terminated in accordance with this Part.

The learned trial Judge was of the considered view that the burden was on the appellants to prove that their services had been terminated based on s. 101 of the Evidence Act 1950. In this case, he said, there was no evidence that the respondent had terminated the services of the appellants in line with s. 12(1) of the Act which states :

12. (1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service.

What had taken place, he added, was only the change of the ownership of the estate. On the question of ownership of the estate. On the question of the indemnity in lieu of notice, he was of the opinion that it was only applicable where financial loss had occurred.

For purposes of completeness, it is pertinent to state the provisions of s. 12(2) of the Act as well which reads:

> 12. (2) The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in writing, shall not be less than -
>
> (a) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;
>
> (b) six weeks' notice if he has been so employed for two years or more but less than five years on such date;
>
> (c) eight weeks' notice if he has been so employed for five years or more on such date:
>
> Provided that this section shall not be taken to prevent either party from waiving his right to a notice under this subsection.

My considered view is that both s. 12 of the Act and reg. 8 of the Regulations are relevant. Going first to the Regulations, based on the facts of the case, it is clear that where there is a change in the ownership of a business, the appellants would not be entitled to any termination benefits if within seven days of that change of ownership, the new owners offer to continue to employ the appellants under terms and conditions of employment not less favourable than those under which the appellants were employed, namely with the respondent, and the appellants unreasonably refuse the offer. Here, the appellants had accepted the offer and it follows that the reg. 8(1) of the Regulations cannot apply to the present facts.

Neither can reg. 8(2) of the Regulations as that provision is only applicable where the new owners did not make the offer under reg. 8(1) of the Regulations in which case both the respondent and the new owners would be jointly and severally liable for the payment of all termination benefits. For our purpose, only reg. 8(3) of the Regulations applies to the facts of this case because the appellants had accepted the offer made by the new owners and their period of employment under the respondent is deemed to be a period of employment under the new owners and the change of employer shall not constitute a break in the continuity of the period of their employment.

But, then, we are not concerned with the aspect of termination benefits in the circumstances enumerated in reg. 8 of the Regulations. We are only concerned with the issue as to whether the fact of a change of ownership of the business amounts to a termination. In this regard, s. 12(3) is abundantly clear in statutorily declaring that it does and that a notice of termination is nothing less than mandatory. This is strengthened by the fact that the parties had agreed in their agreed statement of facts that there was in fact a change of ownership of the estate on 1 September 1990. Further, since no notice of

termination had been given for this occurrence, indemnity in lieu of notice is due to the appellants. It does not matter that seven days after the event, the appellants had in fact accepted the offer made by the new owners.

The appellants are, therefore, entitled to the indemnity of RM231,490.16 in lieu of the notice of termination necessitated by the change of ownership of their business under s. 12(3)(f) of the Act. The appeal is allowed with costs here and in the Court below and the deposit is to be refunded to the appellants.